Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant to Section 332(c)(3)(7)(B)(v) of the Communications Act of 1934	)	WT Docket No. 97-192
	)	
Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation	)	ET Docket No. 93-62
	)	
Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities	)	RM-8577

REPLY COMMENTS OF AT&T WIRELESS SERVICES INC.

AT&T Wireless Services Inc. ("AT&T"), by its attorneys, hereby submits its reply comments in the above-captioned proceeding.[1/] Congress has granted the Commission exclusive jurisdiction to regulate the RF emissions of personal wireless facilities and the Commission should not allow states and localities to eviscerate its decisions. The Commission should prohibit states and localities from requiring costly compliance demonstrations, particularly with regard to categorically excluded facilities for which the Commission has already determined that

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1/ Procedures for Reviewing Requests for Relief From State and Local Regulations Pursuant Section 332(c)(3)(7)(B)(v) of the Communications Act of 1934; Guidelines for Evaluating the Environmental Effects of Radiofrequency Radiation; Petition for Rulemaking of the Cellular Telecommunications Industry Association Concerning Amendment of the Commission's Rules to Preempt State and Local Regulation of Commercial Mobile Radio Service Transmitting Facilities, WT Docket No. 97-197, ET Docket No. 93-62, RM-8577, Second Memorandum Opinion and Order and Notice of Proposed Rulemaking, FCC 97-303 (rel. Aug. 25, 1997) ("Second Order" or "Notice").

the cost of requiring routine evaluation will outweigh any public benefit.[2/] In addition, AT&T urges the Commission to adopt its proposals to provide expedited relief to carriers aggrieved by state and local siting decisions and regulations improperly based on RF emissions.

I. The Commission Has Exclusive Jurisdiction Over RF Emissions and Should Not Permit States and Localities to Eviscerate Its Decisions

AT&T, like GTE, disagrees with the very premise that requests by states and localities for compliance demonstrations are reasonable.[3/] Because regulation of RF emissions is a matter of exclusive federal jurisdiction under both the Communications Act and the National Environmental Policy Act ("NEPA"),[4/] any delegation of this responsibility to states and localities would be not only imprudent, but improper. While the Commission's proposal to require providers to submit copies of "any and all documents related to RF emissions submitted to the Commission as part of the licensing process" for non-categorically excluded facilities is justifiable, permitting states or localities to require demonstrations of compliance for categorically excluded facilities would completely eviscerate the decision to establish this category in the first place. The Commission should not permit states and localities to demand demonstrations from licensees of categorically excluded facilities beyond a written certification that such facilities are in compliance with federal regulations.

While many state and local governments and organizations argue that they should retain a role in the regulation of RF emissions, the time for such policy arguments has clearly passed. By enacting section 332(c)(7)(B)(iv), Congress expressed its intent to preempt state and local actions

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[2/] Second Order at ¶¶ 40, 45-52.

[3/] Comments of GTE Service Corporation ("GTE") at 7.

[4/] Codified at 42 U.S.C. § 4321, et seq.; see also 47 C.F.R. § 1.1301, et seq. (setting forth the Commission's requirements for evaluating the environmental impact of its actions to meet its

based on RF emissions. States and localities may neither regulate based on RF emissions nor enforce the Commission's regulations in this regard. Contrary to the assertions of the Cellular Phone Task Force,[5/] questions of compliance with the Commission's regulations should be reserved to the Commission.

The wisdom of Congress's decision to establish a national framework for RF regulation is underscored by the widely divergent views of the state and local commenters regarding the type of compliance demonstrations they would require. While some governmental authorities seek only copies of documents regarding RF emissions that have been submitted to the Commission,[6/] others argue that there should be no restriction on the information that they may request.[7/] In some circumstances, two or more local agencies in the same geographic area with overlapping jurisdiction have come to diametrically opposed views on their role in RF regulation.[8/] If the Commission fails to preempt states and localities from requiring compliance demonstrations in addition to the showings required by the Commission, wireless providers will be forced to comply with confusing and inconsistent requirements from jurisdiction to jurisdiction and even

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responsibilities under NEPA).

[5/] Comments of the Cellular Phone Taskforce at 2 (arguing that "Congress did not preempt state and local governments from enforcing the Commission's regulations").

[6/] Comments of Orange County, Florida at 6-7.

[7/] Comments of the State of Vermont Environmental Board at 12-13.

[8/] Compare Letter from Larry Kirchner, Principal Environmental Health Specialist, Seattle-King County Department of Public Health, to Marilyn Cox, Sections Supervisor, King County Department of Developmental and Environmental Services, February 11, 1997, at 2; attached to the Comments of AT&T Wireless Services, Inc. as Exhibit 1 (explaining its decision to no longer review electromagnetic radiation reports for personal wireless facilities because review of hundreds of reports over the past five or six years did not find any of these proposed facilities "even remotely close to the Maximum Permissible Exposure standard of the FCC and our local codes"), with the Comments of the Seattle City Council at 3 (describing its compliance

within jurisdictions. Such patchwork regulation overburdens local agencies and wireless providers,[9/] weakening the very protection that states and localities seek to provide their citizens. The public interest is served better by uniform national guidelines enforced at the federal level.

II. The Commission Should Provide Expedited Relief to Carriers Aggrieved by State and Local Actions Based Impermissibly on RF Emissions

In the Notice, the Commission assumes that "final action" by a state or locality is required before it may review an action under section 332(c)(7)(B)(v).[10/] The statutory language of that section, however, makes clear that Congress did not intend for parties aggrieved by state or local action based on improper considerations of RF emissions to have to exhaust any administrative appeals before petitioning the Commission for relief. As Southwestern Bell Mobile Systems, Inc. ("SBMS") and PrimeCo Personal Communications, L.P. ("PrimeCo") explain, while the Communications Act requires "final action" before a party may seek court review, the statute only requires that a party be "adversely affected by an act or failure to act" before petitioning the Commission for relief.[11/] While a number of states and localities contend

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certification requirements, including NIER reports in certain situations).

[9/] While most state and local governments and organizations recognize that requiring additional demonstrations of compliance will be costly, they argue that the costs of demonstrating compliance should be borne by wireless providers rather than local taxpayers. See, e.g., Comments of the Concerned Communities and Organizations at 20; Comments of the Seattle City Council at 3; Comments of Palm Beach County, FL at 1; Comments of the Vermont Environmental Board at 13 and Comments of the Cellular Phone Taskforce at 7. None of these commenters address, however, who will pay to provide state and local governments with the additional staffing and funding they will need to process and evaluate such demonstrations.

[10/] "Final action" is required in order for a party to commence an action in court. In these cases, AT&T agrees with the Commission that the legislative history of section 332(c)(7)(B)(v) demonstrates that Congress intended for aggrieved parties to be able to seek relief expeditiously "rather than waiting for the exhaustion of any independent remedy otherwise required." Notice at ¶ 137 (citing H.R. Conf. Rep. No. 104-458 at 209 (1996)).

[11/] Comments of SBMS at 3; Comments of PrimeCo at 10-12 (discussing 47 U.S.C. §

that a party may not ask the Commission for relief until the state or local administrative appeal process is complete,[12/] adoption of this approach would be contrary to the express statutory language and would cause unwarranted delay. Congress clearly recognized that when improper RF considerations are in question, time is of the essence and adversely affected parties should be permitted to proceed directly to the Commission in these cases.

AT&T supports the Commission's proposal to determine on a case-by-case basis whether a state or locality has "failed to act," taking into consideration such factors as the average length of time it takes to process siting requests. AT&T also agrees with GTE that the Commission should find that any moratorium that prevents action on a particular siting request for more than a reasonable amount of time should constitute a failure to act.[13/] As AT&T has argued in other proceedings, 90 days is a reasonable period for a state or locality to resolve siting issues.[14/] When a state or locality fails to act within such a reasonable time period, it unreasonably delays the rollout of wireless services and imposes incalculable costs on providers. When such a delay is caused by impermissible considerations regarding RF emissions, the Commission must act quickly to ensure that states and localities are not attempting to accomplish through inaction what they are prohibited from doing directly.

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332(c)(7)(B)(v)).

[12/] Comments of Orange County, FL at 2-3; Comments of the Seattle City Council at 1; Comments of the Vermont Environmental Board at 9; and Comments of the National League of Cities and National Association of Telecommunications Officers and Advisors at 8-10.

[13/] Comments of GTE at 4.

[14/] See Comments of AT&T Wireless Services, Inc., filed Sept. 11, 1997, In the Matter of Federal Preemption of Moratoria Regulation Imposed by State and Local Governments on Siting of Telecommunications Facilities, DA 96-2140, FCC 97-264.

In this regard, the Commission should ensure that decisions are not "indirectly" based on concerns about RF emissions by reviewing the underlying public record. Section 332(c)(7)(B)(iii) already requires states and localities to put their decisions in writing and support them with substantial evidence contained in a written record. By reviewing this public record to determine if concerns about RF emissions were actually the basis for the decision and preempting those decisions, the Commission will encourage states and localities to provide a full explanation of their actions. Such a review does not mean, as some commenters suggest, that states and localities will be required to "muzzle" citizens who want to testify about RF concerns at public hearings. The law simply requires that siting decisions and regulations be based on criteria other than RF emissions. The Commission has an obligation to look behind the written decision to determine if such other factors were raised. The Commission also has authority to preempt decisions that are only partially based on RF emissions and should remand such decisions to the responsible state or local authority to reconsider the decision without reliance on prohibited considerations.[15/]

[15/] To ensure that review proceedings are completed as quickly as possible, AT&T strongly believes that the Commission must limit the parties that will be allowed to participate. Only the state or locality that took the complained of action and the wireless provider adversely affected by that action should have standing to participate. As both AT&T and GTE explained previously, the proceeding should be entirely fact-based and limited to determining whether the authority acted on the basis of RF emissions and whether the provider is in compliance with the Commission's RF guidelines. Comments of AT&T at 7; Comments of GTE at 10-11. Other parties will have had an opportunity to participate in the state or local proceedings and their views will be on the record. These parties will have nothing to add to the Commission's inquiry and will only serve to delay the decision-making process.

CONCLUSION

As set forth above and in AT&T's initial comments, the Commission should exercise its exclusive jurisdiction over the RF emissions of personal wireless facilities. The Commission should adopt the preemption procedures proposed in the Notice and should not permit states and localities to demand demonstrations from licensees of categorically excluded facilities beyond a written certification that such facilities are in compliance with federal regulations.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Michelle Mundt, hereby certify that on the 24th day of October 1997, I caused copies of the foregoing "Reply Comments" to be sent to the following by either first class mail, postage pre-paid, or by hand delivery, by messenger(*) to the following:

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